Editor's note: Reconsideration granted; decision vacated -- See Myrtle Jaycox, Serafina Anelon, and Hilma Eakon, 64 IBLA 97 (May 17, 1982)

HILMA EAKON

IBLA 75-607 Decided September 15, 1975

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting in part Alaska Native allotment application F-18746.

Affirmed.

1. Alaska: Native Allotments

An allotment may be granted only when the Native applicant demonstrates actual substantial use and occupation of the land at least potentially exclusive of others, and not merely intermittent use. Where such use is shown, all else being regular, an allotment ordinarily may issue for the smallest legal 40-acre subdivision embracing the area of use.

APPEARANCES: John Scott Evans, Esq., of Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Appellant's Native allotment application was filed under the provisions of 43 U.S.C. §§ 270-1 through 270-3 (1970) and the regulations in 43 CFR Subpart 2651. It recited that appellant had used a 160-acre parcel continuously since 1957 for spring seal hunting and that she had a cache thereon. A field examination made by Bureau of Land Management personnel verified the assertion of use by the existence of the cache, and recommended that an allotment be issued for the 40-acre subdivision used by appellant. Recommendation was made that the allotment be denied for any area outside the 40-acre subdivision encompassing appellant's improvements because there was no evidence of any use or occupation outside the subdivision containing the improvements. This recommendation was accepted and decision rendered by the Alaska State Office, Bureau

of Land Management (BLM), allowing the allotment to the extent recommended and rejecting the application for all lands outside the 40-acre subdivision. This appeal followed.

Appellant asserts use and occupation for the entire 160 acres described in her application. Numerous affidavits of villagers attest to the fact that appellant uses the land applied for on a seasonal basis.

The field examination and affidavits of witnesses verify appellant's use of the land for seal hunting. The cache and other physical evidence supports her assertions that she camps on the site and uses the same for seal hunting in season. A cabin in extreme disrepair indicates a greater use of the area in earlier times. BLM properly found, and we concur, that appellant may be awarded an allotment on the evidence now of record. The gist of the decision below is that under the circumstances outlined appellant's allotment must be limited to the approximately 40 acres in which the cache and other improvements stand. We agree.

[1] Where a Native had merely used a parcel to dock and store his boat, the Department held that use and occupancy was restricted to the land actually used. Herbert H. Hilscher, 67 I.D. 410 (1960). But the Secretary, in the exercise of the discretion authorized by Congress, promulgated the rule that the smallest legal subdivision of 40 acres shall be the parcel allotted when a native demonstrates use and occupancy of any part of that subdivision. Solicitor's Opinion, 71 I.D. 340 (1964); 43 CFR 2561.0-8(b).

The lack of evidence of use of any other than the 1 or 2 acres immediately surrounding the campsite and cache impels the belief that use and occupancy of the allotment area is limited to the land immediately surrounding the cache. Furthermore, the habits and customs of the native peoples, the vast areas covered by them in their quest for food and livelihood, suggest that hunting and fishing are activities which cannot be restricted to any one parcel. The conclusion is manifest -- the land under application serves as a headquarters point during hunting and fishing seasons -- that the use and occupancy of the improved area is potentially to the exclusion of others but the remaining land is not so held. The failure to demonstrate use and occupancy of any area beyond the 40-acre subdivision to the potential exclusion of others requires rejection as to those lands. 43 CFR 2561.0-5(a); Jack Koutchak, 21 IBLA 71 (1975); John Nanalook, 17 IBLA 353 (1974).

Appellant has requested a hearing. A hearing is not mandatory inasmuch as the issuance of an allotment is discretionary with the

Secretary. Pence v. Morton, Civ. No. A-74-138 (D. Alas., April 8, 1975), appeal pending. Furthermore, the facts in this case are not in dispute. Cumulative evidence to substantiate the findings below could serve no purpose. The request for a hearing is denied.

Therefore, pursuant to the authority delegated by the Secretary of the Interior to the Board of Land Appeals, 43 CFR 4.1, the decision below is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge